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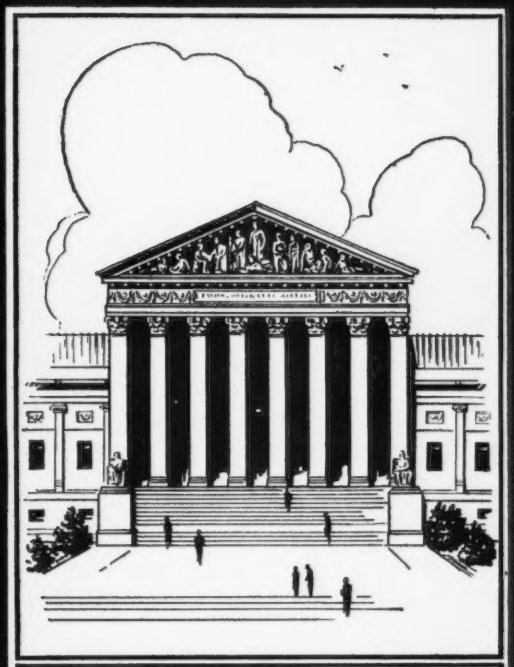

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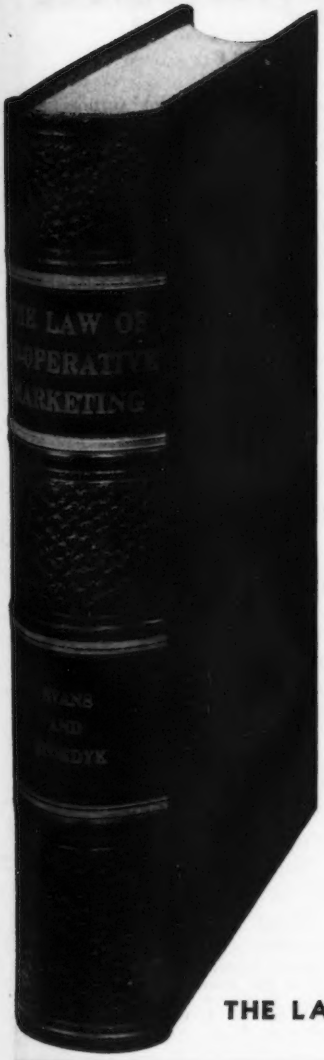

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CONTENTS

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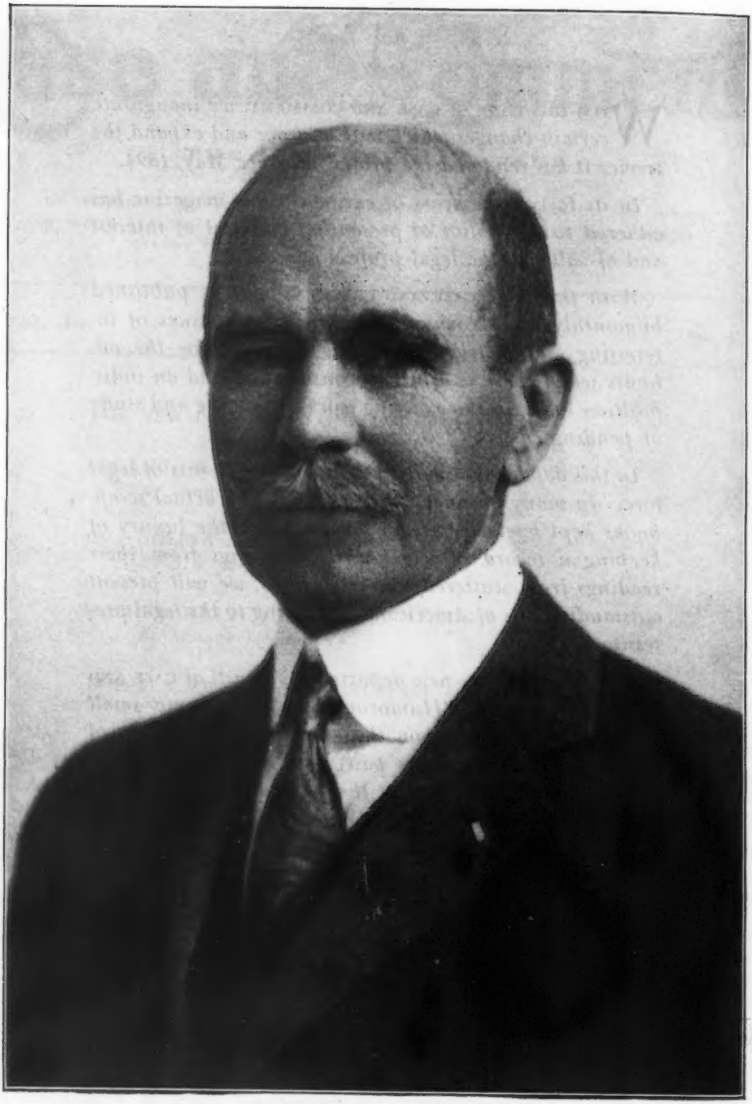


DEAN JOHN H. WIGMORE

LOOKING BEHIND THE LETTER OF THE LAW

By JOHN H. WIGMORE

Dean Emeritus, Northwestern University Law School

(Condensed from the University of Chicago Law Review, Feb. 1937)

An attitude towards the rules of law—an attitude that imports an understanding of the fullest significance of those rules—is particularly necessary in judging the records of legal systems alien to our own. The purport of the records may be verbally plain, and the ideas which the words convey may be familiar and apparently obvious, but a search into the background may reveal something very different.

Let the first instance be taken from the practice of torture of witnesses. This practice was abolished in England, Scotland and the Colonies two and a half centuries ago, not merely because of its cruelty but because of its supposed futility. Chief Baron Gilbert wrote, in the early 1700's: "Pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on." And of course that is the accepted modern Occidental view of human nature; violence is a sure way to block the revelation of truth because it tends to elicit false testimony.

But in parts of the Orient the opposite principle of human nature obtains. There are (or have been) countries in which violence to witnesses is the only sure way to get at the truth. The following chronicle illustrates this (it is from an American observer who lived in the 1890's at the Court of Korea as personal adviser to the Emperor):

"Torture had been abolished by law, it is true, but it was too deeply part of native custom to root out easily. The practice is so widespread in the Far East that the French were obliged to admit it into their colonial legal code, though in a mild form, to be sure. They found out that in their war on river pirates, they could not find witnesses and could not expect to, for it was certain death for a villager to tell on his neighbor. Confession by a witness under torture was admitted, however, in village custom. If a witness returning from court could show marks of torture on his body, he was safe. The French, therefore, paddled every witness thoroughly in a piracy case, with the full consent of the paddled, before ever a question was asked of him. They beat him with an instrument rather like a canoe paddle or a thin cricket bat, on a part where he could not be injured, but where bruises would show up beautifully. After that he could tell the truth, if he were capable of that, without fear of death from his fellow villagers. The bruises had to show, though, when he got home."

Let us take a second instance from Oriental justice, this time from modern Africa. Ideal justice in the Orient is prompt, and prompt action in justice is more often the fact, in the simpler communities at least. The tedious futility of the careful Occidental procedure is to them repugnant. And this is the anecdote told by the Earl of Cromer, long a denizen of Egypt:

"When the French criminal code was put into force in parts of Egypt, one of the principal Algerian Sheikhs

exclaimed: "Then there will be no justice! Witnesses will be required!" The Sheikh was not in the least struck with the fact that in the absence of witnesses an innocent man might possibly be condemned. What struck him was that, as no one could be condemned without witnesses, guilty people would generally escape punishment. This is precisely what was happening in Egypt (since the western criminal courts were introduced).

Here, then, is the paradox that a procedure not requiring witnesses is deemed to get at the truth better than a procedure requiring them.

A third instance I offer from our own law. It concerns the time-honored common-law rule disqualifying a civil party from testifying in his own case. However natural that rule may once have seemed, its anomaly has been felt for nearly a century (since the Common Law Practice Commissioners in 1853 recommended its abolition, on grounds of "plain sense and reason"). To forbid a party to testify who wishes to tell his story seems to us to be contrary to "plain sense and reason." But, on looking behind this obviousness of the modern rule, we may find social circumstances that make it anomalous. Chief Justice Bleckley once announced that "it is becoming, and to be commended, in a party, not to testify, if he can avoid it without positive injury to the cause of truth and justice." When I first read (and quoted) this opinion, I explained it on the theory that in the old-time Southern communities the sentiment of personal honor made it repugnant to a sensitive gentleman to place himself in a situation where his word may be doubted by his fellows and flouted by their verdict. This was indeed a new aspect of the rule to me. But still more light was thrown for me on the rule when one day in 1898, at the Saratoga meeting of the American Bar Association, I met Mr. N. J. Hammond, an accomplished and thoughtful member of the Georgia bar and at one time attorney-general of that state. In one of those extra-curricular evening meetings, around a table full of glasses in the Old Grand Union Hotel, where experiences were swapped between lawyers of all regions, he affirmed to me that in his judgment the abolition of parties' incompetency had been a mistake; and he illustrated his view with this anecdote: One day in court, shortly after the new qualifying statute had passed, he was sitting with a client awaiting the course of the docket, when the client pulled his sleeve and pointed to the witness-stand, where one of the parties in the case was about to testify. "How can that be allowed?" asked the client. "That is the new law," replied Mr. Hammond, "parties may now testify." "That is shocking," protested the astonished client, "If that is the law, the time may come when a gentleman will have to take the stand and lie to support his own case!"

Here again is an instance of an apparently simple and rational rule becoming shocking when considered in the light of local sentiments and social habits.

And finally, another instance in our own law, viewed from the point of view of a foreign lawyer. For generations past our courts have been repeating, as a limitation on the use of expert testimony, this principle: ". . . a witness cannot be allowed to express an opinion upon the exact question which the jury are required to decide." The result is that when an expert insurance adjuster is asked to state whether the storage of gasoline in a dwelling house increases the insurer's risk; or when an expert carpenter is asked to state whether a certain stairway was safely built; or when an engineer is asked to state

whether a certain train could have been stopped within 600 feet; or when an expert surveyor is asked to state whether the boundaries described in a deed are the very boundaries of the land in dispute; or when a medical man is asked to state whether by a certain injury the victim was permanently disabled; or when a qualified person is asked to state whether another was solvent or was an agent or had paid a note or had finished a job in a reasonable time, and so on ad infinitum, hundreds of rulings forbid that testimony be given.

So now comes the foreign lawyer, and asks his friend, "What was the reason for prohibiting that testimony?" and the friend replies, "Because that is the very question which the jury is to decide." Whereon the foreign lawyer replies, in astonishment, "But that would seem to be the very reason for its admission. Instruction from qualified persons is what the jury want, is it not? Why call qualified persons, if not to help the jury on the very point in issue?"

"No," answers the American friend, "our law forbids that; the jury might believe them, and thus might go wrong."

"But if these experts were wrong, then experts could be called on the other side to say so?"

"Yes, of course; but then the jury would be confused."

"They might; but may they not also be confused when any other witnesses on opposite sides contradict each other?"

"Yes, but that can't be helped."

"Then why call the experts at all?"

"No, we couldn't very well do that, but we can call them and then stop them from being of any service; which is what our rule amounts to."

Once, long ago, in Scotland, an English lawyer attending a trial noticed that the judge forbade counsel to put leading questions on cross-examination. "Not ask leading questions on cross-examination?" exclaimed he, "my God, what a country!"

I sometimes think that a candid lawyer from any other civilized country would give expression to like astonishment on hearing of the vagaries of our opinion rule.

It goes to illustrate my theme, that a rule of law in any country cannot be fully comprehended, in its apparent irrationality, without knowing something of the circumstances under which it has grown up and is practiced.

Of course the law is not the place for the artist or the poet. The law is the calling of thinkers. But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.

—JUSTICE HOLMES.

IS A GOLFER A GENTLEMAN?*

By A. P. HERBERT

This case, which raised an interesting point of law upon the meaning of the word "gentleman," was concluded at the Truro Assizes to-day.

Mr. Justice Trout (giving judgment): In this case the defendant, Mr. Albert Haddock, is charged under the Profane Oaths Act, 1745, with swearing and cursing on a Cornish golf-course. The penalty under the Act is a fine of one shilling for every day-labourer, soldier, or seaman, two shillings for every other person under the degree of gentleman, and five shillings for every person of or above the degree of gentleman—a remarkable but not unique example of a statute which lays down one law for the rich and another (more lenient) for the poor. The fine, it is clear, is leviable not upon the string or succession of oaths, but upon each individual malediction, (see Reg. v. Scott (1863) 33 L. J. M. 15). The curses charged, and admitted, in this case, are over four hundred in number and we are asked by the prosecution to inflict a fine of one hundred pounds, assessed on the highest or gentleman's rate at five shillings a swear. The defendant admits the offences, but contends that the fine is excessive and wrongly calculated, on the curious ground that he is not a gentleman when he is playing golf.

He has reminded us in a brilliant argument that the law takes notice, in many cases, of such exceptional circumstances as will break down the normal restraints of a civilized citizen and so powerfully inflame his passions that it would be unjust and idle to apply to his conduct the ordinary standards of the law; as, for example, where without warning or preparation he discovers another man in the act of molesting his wife or family. Under such provocation the law recognizes that a reasonable man ceases for the time being to be a reasonable man; and the defendant maintains that in the special circumstances of his offence a gentleman ceases to be a gentleman and should not be judged or punished as such.

Now, what were these circumstances? Broadly speaking, they were the twelfth hole on the Mullion golf-course, with which most of us in this Court are familiar. At that hole the player drives (or does not drive) over an inlet of the sea which is enclosed by cliffs some sixty feet high. The defendant has told us that he never drives over, but always into, this inlet, or Chasm, as it is locally named. A steady but not sensational player on other sections of the course, he says that before this obstacle his normal powers invariably desert him. This has preyed upon his mind; he has registered, it appears, a kind of vow, and year after year, at Easter and in August, he returns to this country determined ultimately to overcome the Chasm.

Meanwhile, unfortunately, his tenacity has become notorious. The normal procedure, it appears, if a ball is struck into the Chasm, is to strike a second, and, if that should have no better fate, to abandon the hole. The defendant tells us that in the past he has struck no fewer than six or seven balls in this way, some rolling gently over the cliff and some flying far and high out to sea.

* A reprint of Chapter II of Uncommon Law, by A. P. Herbert, by special permission of the author. Copyright 1936, Doubleday, Doran and Co., Garden City, New York.

But recently, grown fatalistic, he has not thought it worth while to make even a second attempt, but has immediately followed his first ball into the Chasm, and there, among the rocks, small stones, and shingle, has hacked at his ball with the appropriate instrument until some lucky blow has lofted it on the turf above, or, in the alternative, until he has broken his instruments or suffered some injury from flying fragments of rock. On one or two occasions a crowd of holiday-makers and local residents have gathered on the cliff and foreshore to watch the defendant's indomitable struggles and to hear the verbal observations which have accompanied them. On the date of the alleged offences a crowd of unprecedented dimensions collected, but so intense was the defendant's concentration that he did not, he tells us, observe their presence. His ball had more nearly traversed the gulf than ever before; it struck the opposing cliff but a few feet from the summit; and nothing but an adverse gale of exceptional ferocity prevented success. The defendant, therefore, as he conducted his customary excavations among the boulders of the Chasm, was possessed, he tells us, by a more than customary fury. Oblivious of his surroundings, conscious only of the will to win, for fifteen or twenty minutes he lashed his battered ball against the stubborn cliffs, until at last it triumphantly escaped. And before, during and after every stroke he uttered a number of imprecations of a complex character which were carefully recorded by an assiduous caddie and by one or two of the spectators. The defendant says that he recalls with shame a few of the expressions which he used, that he has never used them before, and that it was a shock to him to hear them issuing from his own lips; and he says quite frankly that no gentleman would use such language.

Now, this ingenious defence, whatever may be its legal value, has at least some support in the facts of human experience. I am a golf-player myself—(laughter)—but, apart from that, evidence has been called to show the subversive effect of this exercise upon the ethical and moral systems of the mildest of mankind. Elderly gentlemen, gentle in all respects, kind to animals, beloved by children, and fond of music, are found in lonely corners of the downs, hacking at sandpits or tussocks of grass, and muttering in a blind, ungovernable fury elaborate maledictions which could not be extracted from them by robbery or murder. Men who would face torture without a word become blasphemous at the short fourteenth. It is clear that the game of golf may well be included in that category of intolerable provocations which may legally excuse or mitigate behaviour not otherwise excusable, and that under that provocation the reasonable or gentle man may reasonably act like a lunatic or lout respectively, and should legally be judged as such.

But then I have to ask myself, What does the Act intend by the words "of or above the degree of gentleman?" Does it intend to fix social rank of a general habit of behaviour? In other words, is a gentleman legally always a gentleman, as a duke or solicitor remains unalterably a duke or solicitor? For if this is the case the defendant's argument must fail. The prosecution says that the word "degree" is used in the sense of "rank." Mr. Haddock argues that it is used in the sense of a university examination, and that, like the examiners, the Legislature divides the human race, for the purposes of swearing, into three vague intellectual or moral categories, of which they give certain

rough but not infallible examples. Many a first class man has "taken a third," and many a day-labourer, according to Mr. Haddock, is of so high a character that under the Act he should rightly be included in the first "degree." There is certainly abundant judicial and literary authority for the view that by "gentleman" we mean a personal quality and not a social status. We have all heard of "Nature's gentlemen." "Clothes do not make the gentleman" said Lord Mildew in Cook v. The Mersey Docks and Harbour Board (1896) 2 A. C., meaning that a true gentleman might be clad in the foul rags of an author. In the old maxim "Manners makyth man" (see Charles v. The Great Western Railway) there is no doubt that by "man" is meant "gentlemen," and that "manners" is contrasted with wealth or station. Mr. Thomas, for the prosecution, has quoted against these authorities an observation of the poet Shakespeare that

"The Prince of Darkness is a gentleman."

but quotations from Shakespeare (in Court) are generally meaningless and always unsound. This one, in my judgment, is both. I am more impressed by the saying of another author (whose name I forget) that the King can make a nobleman, but he cannot make a gentleman.

I am satisfied therefore that the argument of the defendant has substance. Just as the reasonable man who discovers his consort in the embraces of the supplanter becomes for the moment a raving maniac, so the habitually gentle man may become in a bunker a violent, unmannerly oaf.

In each case the ordinary sanctions of the law are suspended; and while it is right that a normally gentle person should in normal circumstances suffer a heavier penalty for needless imprecations than a common seaman or cattle-driver, for whom they are part of the tools of his trade, he must not be judged by the standards of the gentle in such special circumstances as provoked the defendant.

That provocation was so exceptional that I cannot think that it was contemplated by the framers of the Act: and had golf at that date been a popular exercise I have no doubt that it would have been dealt with under a special section. I find therefore that this case is not governed by the Act. I find that the defendant at time was not in law responsible for his actions or his speech and I am unable to punish him in any way. For his conduct in the Chasm he will be formally convicted of Attempted Suicide while Temporarily Insane, but he leaves the court without a stain upon his character. (Applause.)

THOUGH *Clarence Darrow, with characteristic cynicism, in a recent press interview denounced the law as a "horrible business" and asserted, "There is no such thing as justice—in or out of court," in the judgment of as competent a critic of human institutions, Voltaire, "The administration of justice is the most beautiful function of humanity." So far as any branch of human activity can be said to be exclusive, this work has fallen to the lot of the lawyers. Theirs is the responsibility for its failings; theirs is the credit for what merits it can boast.*

—GEO. R. FARNUM,
in Boston University Law Review.

LUTHER MARTIN, FEDERAL BULLDOG

By MONROE JOHNSON*

ALTHOUGH the name of Luther Martin may be unfamiliar to the present day practitioner, so colorful a character does not deserve oblivion, especially, when no less an authority than Albert J. Beveridge states in his *John Marshall* that for two generations Martin was an acknowledged leader among American lawyers.

Luther Martin was born at New Brunswick, New Jersey, on February 9, 1748. Upon his graduation from Princeton University in 1766, he removed to Maryland. There in 1771, at the age of twenty-three, he was admitted to the bar, soon securing a large clientelé and embarking upon his long and distinguished legal career, during which he served his adopted State for thirty years as Attorney General.

In 1784–85, Martin was a member from Maryland of the Continental Congress. And, in 1787, he was a delegate to the convention at Philadelphia which framed the Federal Constitution. Throughout the convention he was recognized to be one of the leading advocates of States' Rights as opposed to centralization of power in the Federal government. So able, indeed, were Martin's arguments that, strange to say, he is credited with being largely responsible for the first great compromise of the convention that made possible the Constitution, the ratification of which he later opposed. For by his insistence upon equal representation in the Senate for all States, both large and small, the ratification of the Constitution by the smaller States was insured. Martin's championship of States' Rights in the convention is of particular interest in the light of his later career as a staunch supporter of Federalism. Refusing to affix his signature to the proposed Constitution, Martin straightway voiced his strong opposition. It is related that he angrily remarked, "I'll be hanged, if ever the people of Maryland agree to it." Whereupon, a witty colleague advised him to stay in Philadelphia lest he be hanged.

Although a leader in his profession, Martin furnishes a strange and contradictory picture, according to contemporary accounts. An accomplished scholar who wrote with classical correctness, his speech was, nevertheless, ungrammatical, and his manners uncouth. In dress, too, he was slovenly and incongruous, wearing, for example, lace ruffles at his wrists, a style long since abandoned, which were spotted and soiled. An inveterate user of snuff, he was also noted as a heavy drinker in a day when heavy drinking often passed unnoticed. And although he frequently appeared in court while under the influence of liquor, his professional efficiency seldom seems to have been affected. Physically he is described as being of medium height, broad shouldered, nearsighted, absent-minded and harsh of voice, his face crimsoned by the brandy which he constantly imbibed.

An interesting anecdote concerning Martin's inebriety was related by Chief Justice Taney. Taney, when a young practitioner, was once retained as junior counsel in an important case in which the services of the older lawyer had also been secured. The case was to be tried at Hagerstown, Maryland, twenty-six miles from

* Attorney U. S. Department of Justice.

Frederick, the home of Taney. The two attorneys accordingly left the latter town by stage the evening before the trial, intending to spend the night in Hagerstown so as to be in readiness for court the next day. The stagecoach, pursuant to the prevailing custom, stopped *en route* every five miles in order to change horses. At each of these halts, Martin sought the inevitable tavern and satisfied his thirst by drinking whiskey, if it could be obtained, ale, if whiskey was lacking, or buttermilk, if neither could be secured. After their arrival and supper, at which Martin again imbibed freely, it was agreed that some of the complicated features of the case should be discussed before they retired. However, when Taney went to Martin's room, to his chagrin, he found the senior counsel lying across the bed in a state of stupor from his numerous and varied potations. Returning to his own room, the temperate Taney studied the case until nearly daylight, appearing alone in court the next morning. But just as the case was called, to Taney's utter amazement, in walked Luther Martin who, none the worse for wear, exhibited a complete mastery of the subject.

According to another story, a cautious client once retained Martin to represent him, stipulating, however, that the fee should be contingent upon the attorney's keeping his promise not to drink during the trial. And, for a time, Martin tried manfully to comply with his promise. Finally, however, he could stand the strain no longer and was forced to resort to a technicality to extricate himself from his dilemma. Sending for a loaf of bread, the astute attorney soaked it in a pint of brandy. He then proceeded to *eat* the stimulant and, incidentally, is said to have won his case.

But on one occasion, at least, John Barleycorn got the better of Luther Martin. While he was arguing before the Supreme Court of the United States the important case of Fletcher v. Peck, involving the notorious Yazoo Fraud, he became so intoxicated that the court adjourned to enable the bibulous barrister to recover his faculties. Thus, aside from his other high honors, Martin enjoyed the unique distinction of having so august a tribunal pay tribute to his professional standing, under these most singular circumstances.

In the year 1804–5, public attention was focused upon the impeachment of Justice Samuel Chase of the Supreme Court of the United States, who had been one of the signers of the Declaration of Independence. Chase, among other accusations, was charged with having used his judicial office to deliver a Federalist philippic against the Jefferson Administration. The case thus had a distinct political aspect.

The able, but eccentric, John Randolph of Roanoke managed the impeachment proceedings. For the defense there was assembled an imposing array of attorneys, led by Luther Martin who had rushed to the aid of his fellow Federalist, eager, as he expressed it, "to teach the Virginia Democrats some law." As Vice President of the United States, the presiding officer of the Senate was Aaron Burr, by whose pistol, at Weehawken, but a short time before, had fallen the ablest Federalist of them all—Alexander Hamilton. Burr, indeed, was even then under indictment for murder. Nevertheless, as one hostile newspaper put it, he presided over the Chase trial "with the dignity and impartiality of an angel, but with the rigor of a devil."

The trial resulted in the acquittal of Chase, failure to sustain the impeachment being largely due to the

able arguments presented by Luther Martin.

So much has been written regarding the trial for treason of Aaron Burr that it suffices to refer briefly to the leading part played by Luther Martin in that historic drama. It will be recalled that this *cause celebre* was tried in the United States District Court at Richmond in 1807. And the political world was stirred to its depths because of the prominence of the participants, the trial of the former Vice President of the United States being presided over by Chief Justice John Marshall.

Prosecution of Burr had been instituted at the instance of President Jefferson, who was firmly convinced of the guilt of the accused. The political features of the case could not fail to attract so staunch a partisan as Luther Martin. And, it is not surprising that he headed the forces of Federalism marshaled for the defense. During the course of the case, Martin audaciously asked the court to issue a subpœna *duces tecum* directed to the President, himself, which request was promply granted by the Chief Justice. However, the amiable, but astute, philosopher-politician occupying the White House calmly proceeded to ignore the summons. Outwardly cool, but boiling within, Jefferson, forthwith, wrote to the United States District Attorney suggesting that Martin be charged with misprision of treason in order, he said, "to put down that unprincipled and impudent Federal bulldog." However, the bellicose "bulldog" seems to have repaid the compliment in kind, since his favorite form of denunciation is stated to have been, "Sir, he is as great a scoundrel as Thomas Jefferson."

Despite the popular belief in Burr's guilt, Martin and his colleagues were able to secure an acquittal, the jury rendering the peculiar near-Scotch verdict of "not proved to be guilty" and therefore "not guilty."

In 1820, Martin suffered a stroke of paralysis. Ever improvident, he now became totally dependent upon his friends. In this situation the Legislature of Maryland passed an act that is unparalleled in American history. This singular statute provided that every lawyer in the State be required to pay an annual license fee of five dollars, the entire proceeds to be turned over "for the use of Luther Martin." Martin, aged, infirm and almost deranged, was finally taken to the home of Aaron Burr, where he was tenderly cared for until his death, July 10, 1826. Whatever faults Burr may have had, ingratitude was not among them.

I AM *quite convinced that if the citizens at large took greater interest in their legislative bodies and the channels thru which our laws, at least the statute laws, are created, instead of considering any attorney a mere jockey to help them ride through a maze of existing laws and decisions, so as to avoid or get around them for their own selfish and private gain, that the proverbial attitude of considerable disrespect leveled toward the legal profession as a whole, would be found to exist in a misconception among the members of society themselves and not, as so often stated, among the members of the legal profession.*

ELDRIDGE HART,
Before the Florida Bar Association.

THE BLACKBOARD AND CRIMINAL DEFENSES

By H. B. WALKER

Of the Idaho and Wyoming Bars, N. U.—'22

FROM time immemorial it has been the custom of defense attorneys to bombard a jury with oratory, sentiment, dramatics and a variety of subtle influences to gain an acquittal for their client. Practically every appeal is made by word of mouth through the juryman's ear, utilizing mainly the one sense, namely, the sense of hearing as the sole inlet to the juryman's mind.

Experienced trial lawyers know that the average man selected for jury service in a criminal cause is not highly trained or experienced in the field of logical thinking. A heavy, close argument of two hours so befuddles an ordinary juryman that he becomes like the Minnesota Justice of the Peace who objected to hearing counsel for the defense argue for as the old Justice said, "when I hear both sides of the case I just don't know which way to decide."

The prosecution has a considerable natural advantage by having the opening and closing arguments to a jury. The minds of an easily influenced jury can often be so positively won over by the opening argument of the prosecution that no subsequent argument can displace the conclusions as have been suggested to them by the prosecutor, who usually assumes the prerogative of doing the thinking for the jurymen.

If in some way or manner an appeal can be made to the jurymen through other senses than that of hearing alone it oftentimes is the touchstone. The following outlined method is one in which an attempt is made to reach the juryman's mind via the eye and the ear combined. What can be easily seen can be easily understood! Elementary minds are aided by effective illustration. Our early education is mainly through the eye. Interest in a subject is best held by illustrating same openly and simply before the eye. Negligence lawyers commonly use toy automobiles to aid in the visualization of a car crash. Actual photographs in the hands of a jury never fail to arouse interest. Such are the attempts to make the juryman see and understand the situation. Illustrating direct by the simple use of a blackboard is graphic and very convincing for many types of cases and is especially usable in criminal causes; the following is the "black-board chain" method.

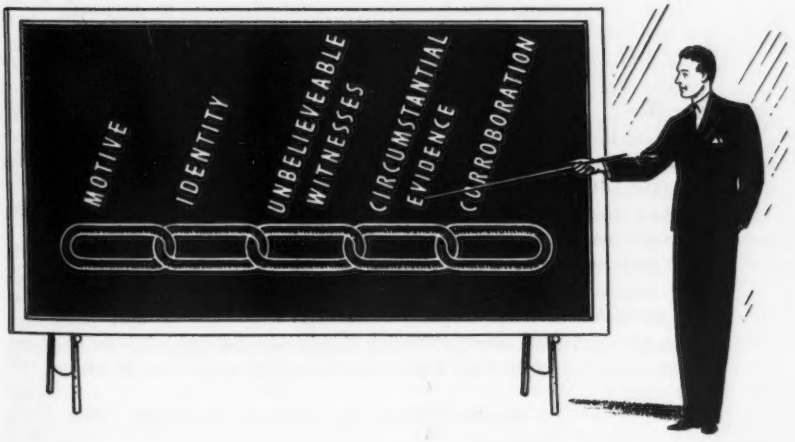
In the selection of a jury to try a criminal cause defense counsel, among the other questions asked, should inquire of the prospective jurymen if they understand that every criminal charge must be proven by the State beyond a reasonable doubt and by competent evidence and will each juryman bear in mind that the evidence to be adduced will necessarily consist of several phases, different evidence to prove intent, different evidence to prove identity, etc., etc., and that such different types of evidence may be compared to the links of a huge chain and the chain in its entirety being the evidence upon which they must convict or acquit. The next step should be to have the prospective juryman affirm and promise that he will acquit if a single link or connection in this chain of evidence as produced appears broken or

disconnected. A firm and persistent effort to impress the jurymen that they will look at the case in the light of such a chain is the "build up" or "background" which will be resultful before the case is finally closed.

Every criminal case presented to a jury has "weak spots" and these weak spots are essential elements in the State's case as well, strikingly evident in the "Hauptman Case" of 1935. If defense counsel will plan his theory of defense attack on the necessarily weak spots of the case as offered by the prosecutor the structure as erected for conviction can be pulled down in the mind and eye of the juryman. (Of course, if the case is being tried in the newspapers rather than in the Courts, anything may happen!)

As the actual evidence is presented, counsel for the defense being on the alert for the weak spots in the State's cause can very readily detect this or that line of evidence which is defective, insufficient or unbelievable and for which a link in the chain is to be denominated later in argument. These "weak spots" when linked together make up the chain. Such a chain is to be drawn or made up openly before the jury's eyes on a suitable blackboard and used as the opening part of defense counsel's argument to the jury. It is usually best to have five links in the chain, not too many nor too few, all depending upon the opportunities and character of the case at bar. Vigorous argument and attack right before the jury's eyes should be made on each and every one of the named links in the chain—some should be totally erased, others lined through, others questioned seriously with the result that the State's chain of evidence is badly broken up and destroyed, all beyond repair let us hope!

In a chain of five links you also have four connections thereto so it means that the defense has really nine chances to upset the prosecutor's case and disrupt his theory of proof "beyond a reasonable doubt." After each and every link has been analyzed and found wanting in the scales of justice, for no chain is stronger than its weakest link, the jury should again be reminded that on their voir dire examination they promised to look at the case as in the form of a chain all properly connected up and each and every link fully proven and



now that you have graphically shown them without magic or sleight-of-hand that the chain is in ruins and totally broken up nothing remains for them to do but to retire and vote an acquittal. In supplement it is offered that the suggestion be made to the jury that they are at liberty to redraw this chain when in deliberation in their jury room and to again and further consider the matter from the standpoint of a chain.

It is well known that such a presentation by the defense holds the close interest of the juryman—he can see it and follow the defects as pointed out and one or more of the insufficiently proven links will most certainly appeal to his reasoning and understanding and if he can be held to his promise made on voir dire he finds himself required to vote for the acquittal of the defendant. Such a method of attack on the State's case is brief, pointed, clearly understood and is convincing.

THE PHILOSOPHY OF A COUNTRY LAWYER

The lawyer who gets nothing out of his profession but his fees is a failure.

A smart lawyer will learn from a fool.

As many cases are lost by asking too many questions as there are by not asking enough.

No matter how strong your case may be, do not fall into the error of believing that it cannot be defended.

It is rare indeed that we find an advocate and a counselor combined in the same lawyer.

A matter may be small and trifling to you yet it is mighty important to your client.

If you keep your office faithfully your office will keep you.

Never tell a client that he can't do what he wants to do until you are sure there is no way for him to do it. You may hurt his pride and lose a client.

Make every client feel that his case is the most important in the office.

If you don't know the answer be honest and say "I don't know." Your client does not expect you to know everything and will give you time to look it up.

When circumstances demand an immediate answer, use your common sense and the golden rule and nine times out of ten when you look it up you will find the law supports you.

Be courteous to the younger lawyers. It pays big dividends both in cash and friendships.

Never criticize a juror for having found against you. To do so results in making him your enemy and you may need him in your next case.

—*Kentucky State Bar Journal*, December, 1936.

THE "COON" DOG CASE

Submitted by Mark T. Brown, Hamilton, Ohio.

Hayes v. Meyers, Court of Common Pleas, Butler County, Ohio.

Boli, J.

PLAINTIFF is suing in replevin to recover possession of two white and liver-colored hound dogs—more particularly described as "coon" or "night" dogs—one male—the other of the gentler sex. After much tribulation and two trials this cause comes into this Court from the Tribunal of one, Peter Messal, Justice of the Peace, perhaps on the theory that the third trial will be the charm—or more likely, because the consistent and undeviating Squire rendered J. for P. and the defendant finding himself barking up the wrong tree, chose this forum to continue the battle.

The evidence shows that on the night of the 10th of December, 1936, under a low-hanging moon, Plaintiff hied himself forth with his dogs of the night in search of the elusive raccoon.

He chose as his fields of endeavor those in the environs of what plaintiff called "Gregor Crick." Some of the older members of our Bar will recall that this is the old stamping ground of our revered associate Dick Shepherd—albeit if gossip serves us truthfully his night hunting was not done with dogs.

Plaintiff testified that upon reaching the hunting grounds he removed the collars from the dogs and encouraged them "to get along little doggies, get along." Perchance the hounds misunderstood this as "so long," for so long it was that Plaintiff waited for their return until the first great streaks of dawn touched the eastern sky but neither hide or hair or nary a musical note was seen or heard of them.

Perhaps this is the first recorded instance wherein the dog has resorted to the modern remedy of a "sit down strike."

A week and a day later Defendant discovered the dogs in his barn and the third day following so informed Plaintiff's wife.

Then followed bargaining between Plaintiff and Defendant. Plaintiff claiming he offered $10.00 and that Defendant demanded $50.00 for his caring for the dogs. On the other hand, Defendant claimed he asked $10.00 while Plaintiff only offered $5.00. Whatever may be the truth, apparently the gulf between them seemed wider even than that which is now existing between Dizzy Dean and Branch Rickey.

Defendant contends that, in the eyes of the law, dogs are not property and therefore, Plaintiff cannot maintain this action. "Dog"—man's most faithful friend not property?—it is almost as absurd to say: "There is no

Santa Claus" or that "the mighty Casey did not strike out."

Fortunately, on this point, and with almost equal logic, this Court enjoys the concurrence of the seven old men in Columbus in the case of Hill v. Micham, 116 O. S. 549.

Those of us who have read Senator Vest's beautiful tribute to this animal will agree that next to the dog—man's wife is his best friend.

Of course, in this case there are two dogs—which makes Plaintiff's wife rate third—or in the parlance of the turf "to show."

This rating is not arrived at arbitrarily but is strongly inferred from the direct evidence of the Defendant who testified that when he informed Plaintiff's wife that he found the hounds, she replied that she had wished she would never see them again. Were plaintiff to insist: "Love me—love my dog" the situation would appear to challenge the wife "to show me." At any rate, since her disclosure in open Court in fear and apprehension this Court has daily scanned the domestic relation filings.

It will be noted that the Plaintiff admits that he proffered to Defendant the identical amount that at the trial Defendant contended he asked for.

As far as this Court can see this just about eliminated the bark as well as the bite from a dog-gone nice case.

At least the Court has lost less sleep over this case than he would have, were he the owner of the night hunting dogs.

Although we have been able to follow Plaintiff and his hounds thus far —we can not agree with his contention that the doctrine of estrays does not apply. Therefore, we find Defendant is entitled to compensation for his trouble.

No doubt, because of this decision being more or less a "dog-fall," both parties will feel that the Court—not the dogs—has gone astray.

But alas, this Court has already discovered, only too late, that "it's a dog's life" after all. Perhaps it is only a natural ambition for both dog and man to aspire to the Bench.

The judgment of the Court is that Plaintiff and his white and liver-colored "night" dogs shall be reunited forthwith, upon condition that he pay the Defendant the sum of $10.00 for the care of the dogs while sojourning with him—and that the Plaintiff go hence without day—but not without "night" dogs.

JUDGE P. P. BOLI

March 15, 1937.

SENTENCE OF SLATER

Submitted by Roy C. Nelson, Elizabethton, Tennessee Bar.

JOHN SLATER! You have been convicted by a Jury of your county of the wilful murder of your own slave; and I am sorry to say, the short, impressive, uncontradicted testimony on which that conviction was founded, leaves but too little room to doubt its propriety.

The annals of human depravity might be safely challenged for a parallel to this unfeeling, bloody and diabolical transaction.

You caused your unoffending, unresisting slave to be bound hand and foot, and by a refinement in cruelty, compelled his companion, perhaps the friend of his heart, to chop off his head with an axe, and to cast his body, yet convulsing with the agonies of death, into the water! And this deed you dared to perpetrate in the very harbor of Charleston, within a few yards of the shore, unblushingly, in the face of open day. Had your murderous arm been raised against your equals, whom the laws of self-defense and the more efficacious law of the land unite to protect, your crime would not have been without precedent, and would have seemed

less horrid. Your personal risk would at least have proved, that though a murderer, you were no coward. But you too well knew that this unfortunate man, whom chance had subjected to your caprice, had not like yourself, chartered to him by the laws of the land the sacred rights of nature, and that a stern, but necessary policy had disarmed him of the rights of self-defense. Too well you knew that to you alone could he look for protection and that your arm alone could shield him from oppression, or avenge his wrongs; yet that arm you cruelly stretched out for his destruction.

The counsel, who generously volunteered his services in your behalf, shocked at the enormity of your offense, endeavored to find refuge, as well for his own feelings as for those of all who heard your trial, in a derangement of your intellect.

Several witnesses were examined to establish this fact, but the result of their testimony, it is so well apprehended, and was as little satisfactory to his mind, as to those of the jury to whom it was addressed. I sincerely wish this defense had proved successful, not from any desire to save you from punishment which awaits you, and which you so richly merit, but from the desire of saving my country from the reproach, of the foul reproach of having in its bosom so great a monster.

From the peculiar situation of this country, our fathers felt themselves justified in subjecting to a very slight punishment him who murders a slave. Whether the present state of society requires a continuation of this policy, so opposite to the apparent rights of humanity, it remains for a subsequent legislature to decide. Their attention would ere this have been directed to this subject for the honor of human nature, had they known such hardened sinners as yourself were still within the confines of this great State to disturb the repose of society.

The grand jury of this district, deeply impressed with your daring outrage against the laws of both God and man, have made a very strong expression of their feelings on the subject of further legislation; and from the wisdom and justice of that body, the friends of humanity may confidently hope soon to see the blackest incident in the catalogue of human crimes pursued by appropriate punishment.

In proceeding to pass the sentence which the law provides for your offense, I confess I never felt more forcibly the want of power to make respected laws of my Country whose minister I am. You have already violated the majesty of these laws. You have profoundly pleaded the law under which you stand convicted, as a justification for your crime. You have held that law in one hand, and brandished your bloody axe in the other, impiously contending that the one gave license to the unrestraining use of the other.

But though you will go off unhurt in person, by the present sentence, expect not to escape with impunity. Your bloody deed has set a mark upon you, which I fear the good actions of your future life will not efface. You will be held in abhorrence by an impartial world, and shunned as a monster by every honest man. Your unoffending posterity will be visited for your iniquity, by the stigma of deriving their origin from an unfeeling murderer. Your days will be but few, they will be spent in wretchedness, and if your conscience be not steeled against every virtuous emotion if you be not entirely abandoned to hardness of heart, the mangled mutilated corpse of your murdered slave will ever be present in your imagination, obtrude itself into

all your amusements and haunt you in the hours of silence and repose.

But should you disregard the reproaches of an offended world, should you hear with calloused insensibility the gnawings of a guilty conscience yet remember, I charge you, remember that an awful period is fast approaching, and with you is close at hand, when you must appear before a tribunal whose want of power can afford you no prospect of impunity; when you must raise your bloody hands at the bar of an impartial omnipotent Judge! Remember, I pray you, remember whilst yet you have time, that God is just, and that his vengeance will not sleep forever.

THE TRUE JUDGE

By Robert N. Wilkin.

(Extracted from Los Angeles Bar Association Bulletin, March 19, 1936, Vol. 11, No. 7.)

THE true judge must have something of the vision of a prophet. He must be able to see the trends of his time extended, so that principles which he announces may be adjusted to conditions yet to come. The observation of Graham Wallas that a great judge needs a touch of the qualities that make a poet has been quoted with approval by Professor Chafee, Justice Cardozo and others. Poets, as has been stated, bear the same relation to society as the antennæ of an insect to its body; they are "feelers" of the body politic. Their sensibilities are more acute, more advanced than those of their contemporaries, and what they feel and express today their fellows will feel and understand tomorrow. Poets, prophets, judges—they are God's elect; we cannot elect them.

Judges in early times were priests, or more accurately stated, the priests performed the functions of judges. There is still much about the judicial office that is priestly. This has ever seemed quite natural to those who took seriously their first legal learning from Blackstone, who stated at the outset that all human laws depend upon divine law. While for a time that teaching seemed out of fashion, the more recent trend is to acknowledge again our subjection to a law of nature, a law divine. Be that as it may, it will not be disputed that a proper performance of judicial duties requires a devotion quite similar to the consecration of the priest. Judges, like the clergy, should keep unspotted from the world. Any personal interest, any selfish concern, corrupts not only the judge but the judicial function. Any want of honest detachment in the judge undermines public faith in judicial administration. As has frequently been stated, it is quite as important to the public that judges should be free from the appearance of evil as that they should be free from actual evil. The prevalent disrespect for law is prompted not so much by corruption in the courts, as by that system of choosing judges which makes every judge suspect.

A DUAL PERSONALITY

FALSE *teeth are personalty while in the owner's pocket, but they are part of the owner's body when in his mouth!*

So a Los Angeles Appellate Court ruled in a suit brought by a film actor to collect on a personal property insurance policy. The teeth had been lost from his pocket.

—JUSTINIAN.

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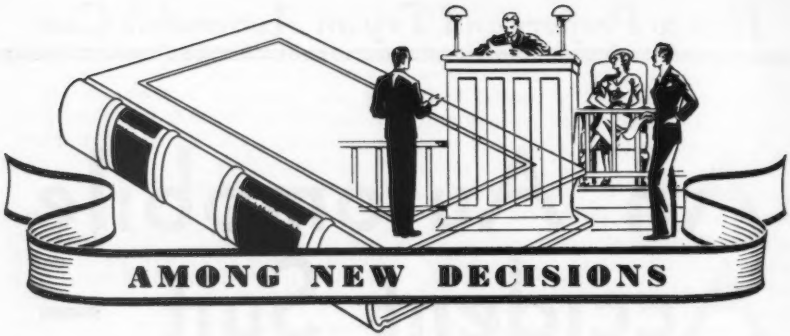

Animals — *dog damaging property.* In Baker v. Howard County Hunt, — Md. —, 188 A. 223, 107 A.L.R. 1312, it was held that the owner of a dog is liable if he either takes it himself where he knows that because of its training, nature, and instinct it will probably damage the property of others, or if with that knowledge he permits it to stray beyond his control, and it trespasses upon the property of other persons.

Annotation: Owner or keeper of trespassing dog as subject to injunction or damages. 107 A.L.R. 1323.

Automobiles — *employer's liability for salesman's negligence.* In American National Ins. Co. v. Denke, — Tex. —, 95 S. W. (2d) 370, 107 A.L.R. 409, it was held that an insurance company is not answerable for the negligent operation of an automobile belonging to the agent's wife by an agent employed to collect premiums and solicit business, over whom it exercised control only as to things to be done, such control not extending to the physical details of his movements and leaving him free to choose any mode of travel which he might see fit, even though he was at the time engaged in the furtherance of the company's business.

Annotation: Liability of employer for injuries by automobile while being driven by or for salesman or collector. 107 A.L.R. 419.

Bankruptcy — *allowance of expenses under* § 77B. In Teasdale v. Sefton Nat. Fibre Can Co. 85 F. (2d) 379, 107 A.L.R. 531, it was held that the provision in § 77B of the Bankruptcy Act, 11 U. S. C. A. § 207, relating to corporate reorganizations, that the judge may allow a reasonable compensation for the services rendered and reimbursement for expenses incurred in connection with the proceeding by certain persons and their attorneys, contemplates the exercise of a sound discretion by the court as to the amount and the persons to whom compensation shall be allowed, and that allowances shall be made only to those who have rendered services which contribute to the solution of the problems confronting the corporation and in the achievement of its rehabilitation.

Annotation: Construction and application of provisions of § 77B of Bankruptcy Act relating to allowance for expenses and services. 107 A.L.R. 537.

Bankruptcy — *reorganization of corporation.* In Security-First Nat. Bk. of Los Angeles v. Rindge Land & Navigation Co. et al. 85 F. (2d) 557, 86 F. (2d) 3, 107 A.L.R. 1240, it was held that face value of bonds and not the percentage of such value paid by the present holders is to be considered in applying the provisions of Bankruptcy Act, § 77B, 11 U. S. C. A.

§ 207, which, as one of the alternative conditions of the confirmation of a proposed plan of reorganization not approved by the holders of the requisite percentage of claims, requires that it shall make provision for the payment of the claims of the dissenting creditors in cash in full.

Annotation: Rights of holders of obligations of debtor under § 77B of Bankruptcy Act as affected by the fact that they purchased the obligations at less than their face value. 107 A.L.R. 1256.

Banks — *garnishment after issue of draft.* In Kossover v. Willimantic Trust Co. 122 Conn. 166, 107 A.L.R. 693, 187 A. 907, it was held that a bank which has issued a draft to a depositor for the amount of the deposit may protect itself against double liability in the event of garnishment of the deposit by delaying disclosure and resorting to reasonable diligence to ascertain whether the draft has been presented to the drawee, or by entering into an express agreement when the draft is issued, that it is accepted in actual payment and discharge of the debt.

Annotation: Bank deposit as subject of garnishment for debt of depositor as affected by previous acts by bank in relation to deposit. 107 A.L.R. 697.

Banks — *purpose of Bank Conservation Act.* In Davis Trust Co. v. Hardee, — App. D. C. —, 107 A.L.R. 1425, 85 F. (2d) 571, it was held that the purpose of the Federal Bank Conservation Act of 1933 is to enable the Comptroller to appoint conservators rather than receivers of a national bank where, in his judgment, there is a prospect that the bank may later reopen and resume its corporate functions, the act being intended to secure the temporary control, under the direction of the Comptroller, of all banks suspected of being insolvent, but as to which the situation is not so hopeless as at the time to require appointment of a receiver.

Annotation: Bank conservators. 107 A.L.R. 1431.

Banks — *stopping payment on cashier's checks.* In Polotsky v. Artisans Savings Bk. — Del. —, 107 A.L.R. 1458, 188 A. 63, it was held that a check drawn by one bank upon another is subject to countermand or stopping of payment by drawer.

Annotation: Right to countermand or stop payment on cashier's check or check or draft drawn by one bank upon another. 107 A.L.R. 1463.

Children — *contributory negligence of.* In Eckhardt v. Hanson, 196 Minn. 270, 107 A.L.R. 1, 264 N. W. 776, it was held that rejecting the rule of some jurisdictions that all children under the age of seven are conclusively presumed incapable of negligence, held that, in this case, the question whether a child just past the age of six was chargeable with contributory negligence was for the jury.

Annotation: Contributory negligence of children. 107 A.L.R. 4.

Conflict of Laws — *damage to interstate shipment.* In Huddy v. Railway Express Agency, 181 S. C. 508, 107 A.L.R. 1437, 188 S. E. 247, it was held that the liability of a carrier to respond in punitive damages because of wilfulness on the part of its agents and servants in delaying an interstate shipment is to be tested by the common law; that is, by the common law as administered by the Federal courts.

Annotation: Liability of carrier to punitive damages with respect to subject of interstate shipment. 107 A.L.R. 1446.

Conspiracy — *interference with Federal citizenship rights.* In Steedle

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Gentlemen:

The United States Circuit Court of Appeals for the Seventh District in Chicago has recently adopted the following rule: "Where more than three cases are cited to a given proposition, the three most relied on shall be first cited, and be printed in bold-face type."

In the language of one of the United States Circuit Court of Appeal Judges, this rule "epitomizes the purpose and the accomplishment of American Jurisprudence."

Judge Evan A. Evans of this Court once commented, in substance, "The brief that attempts to cite every case dealing with the subject-matter in litigation, and to quote copiously from each of the decisions, is hopeless. Instead, the effort should be to select from the mass of decisions that deal with such subject-matter, only those which, by reason of their excellence, have a finality which no worthy adversary will question."

The Bench and Bar who are most progressive in their thinking, thoroughly appreciate your successful efforts and accomplishment in tendering to the bar American Jurisprudence.

This is the first indorsement of a law book I have ever rendered, and I have practiced law nigh on to fifty years.

Yours respectfully,

Lyman G. Wheeler

LYMAN G. WHEELER

v. United States, 107 A.L.R. 1361, 85 F. (2d) 867, it was held that the crime denounced by the Federal Statute, § 5508, Rev. Stat. 18 U. S. C. A. § 51, of conspiring to oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, cannot be predicated upon an agreement to change the votes cast at an election in order that certain candidates for the state legislature might be declared elected, however reprehensible the agreement may be in violating state laws.

Annotation: Construction and application of Federal statutes denouncing conspiracy directed against exercise or enjoyment of rights or privileges under the Constitution and laws of the United States. 107 A.L.R. 1363.

Construction Contract — *acceptance of work.* In Nees v. Weaver, — Wis. —, 107 A.L.R. 1405, 269 N. W. 266, it was held that acceptance by the owner of the work which will support a recovery on quantum meruit by a contractor who has not substantially performed must be something besides keeping and using where there is no opportunity to return what has been received.

Annotation: What amounts to acceptance by owner of work done under contract for construction or repair of building which will support a recovery on quantum meruit. 107 A.L.R. 1411.

Constitutional Law — *publication of tax lien foreclosure.* In Re Dutcher, 275 Mich. 462, 107 A.L.R. 279, 266 N. W. 464, it was held that legislation which provides for the publication of a petition and order in a chancery suit for the foreclosure of a tax lien which merely shows that court proceedings are pending, without any description of the land or designation of the owners, and stating that one may determine whether his land is involved by examining the delinquent tax list in the office of the county clerk or county treasurer, does not meet the constitutional requirement of due process.

Annotation: Failure of advertisement in judicial proceeding for sale of land for delinquent taxes or foreclosure of tax lien, to describe lands affected, as contrary to due process of law or other constitutional objection. 107 A.L.R. 285.

Contracts — *time as of essence.* In Williams v. Shamrock Oil & Gas Co. — Tex. —, 107 A.L.R. 269, 95 S. W. (2d) 1292, it was held that whether a stipulation in the contract that time is of its essence is for the benefit of both parties must be determined from a consideration of the contract as a whole, the real intent of the parties being the controlling factor.

Annotation: Parties or obligations to which time-of-essence clause in contract applies. 107 A.L.R. 275.

Corporate Stock — *valuation for taxation.* In Kresge Co. v. City of Detroit, 276 Mich. 565, 107 A.L.R. 1258, 268 N. W. 740, it was held that the action of assessors in fixing the taxable value of shares of stock in a foreign corporation the net value of whose assets is represented by its investments in real property in Canada, on the basis of the balance sheet of such corporation—such being the usual method of determining the value of shares in a foreign corporation where there is no open market for the stock—instead of on the basis of the market value of the real property, is not so arbitrary, capricious, discriminatory, or violative of the rule of uniformity as to require the court to set aside the assessment.

Annotation: Basis of valuation of corporate stock for purposes of taxation of such stock. 107 A.L.R. 1263.

Costs — *counsel fees against estate protected.* In Wallace v. Fiske, 107 A.L.R. 726, 80 F. (2d) 897, it was held that the attorney of one of several remaindermen, by whose efforts in a suit brought by his client a decree of the Federal court was obtained adjudicating that upon the life tenant's death his client's remainder interest and those of the estates of two deceased remaindermen would be entitled to certain stock, including stock dividends, as against the claim of a party defendant who represented the life tenant's interest, is, upon final determination that the remainder interests of other remaindermen are protected by the decree, entitled to an assessment of counsel fees against their remainder interests notwithstanding that he has been compensated for his services by his own client, and that such remaindermen, by attorneys employed by them, originally joined with the party representing the life tenant's interest in asserting the right of the latter against the remainder interests, it appearing that after the death of the life tenant they sought to accept the benefits of the decree as a basis of a claim for distribution of the stock to them as a part of their remainder interests, and as ground for contesting the claim of the state to inheritance taxes in respect of the stock as part of the estate of the life tenant who died subsequently to the decree.

Annotation: Allowance of attorney's fee against property or fund increased or protected. 107 A.L.R. 749.

Criminal Law — *sentences on various counts.* In United States v. Greenhaus, 107 A.L.R. 630, 85 F. (2d) 116, it was held that sentences imposed in form for three years on odd numbered counts in prosecutions for fraudulent use of mails, and five years on even numbered counts, sentence on even numbered counts to be suspended under certain conditions, are in effect a single sentence as regards the rule that suspension and probation cannot be made conditional upon serving a prior portion of a sentence.

Annotation: Are sentences on different counts to be regarded as for a single term or for separate terms as regards pardon, parole, probation, suspension, or commutation? 107 A.L.R. 634.

Damages — *effect of building regulations in damage of building.* In Zindell v. Central Mutual Ins. Co. — Wis. —, 107 A.L.R. 1116, 269 N. W. 327, it was held that plaintiff in an action in tort for damage to his garage is entitled to have the garage restored in such a way as to meet the requirements of building regulations applicable to repairs of the extent rendered necessary by the tort, he having otherwise had the right to maintain the building in its previous condition.

Annotation: Amount recoverable from one liable for damage to building as affected by building regulations applicable to restoration or repair of damaged buildings. 107 A.L.R. 1122.

Damages — *wrongful cancelation of insurance.* In Life & Casualty Ins. Co. v. Baber, 168 Tenn. 347, 107 A.L.R. 1228, 79 S. W. (2d) 36, it was held that the measure of damages for insurer's wrongful refusal to accept premiums on a policy of life insurance, the insured being willing to rescind, is the premiums paid, as against the insurer's contention that the recovery should be limited to the "value of the policy" at the date when the contract was breached.

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Annotation: Remedy and measure of damages for wrongful cancelation of life insurance. 107 A.L.R. 1233.

Domicil — *voting as evidence of.* In Hiatt v. Lee, — Ariz. —, 107 A.L.R. 444, 61 P. (2d) 401, it was held that registration in a state, or even voting therein, is not conclusive on the question of change of domicil.

Annotation: Significance of place where one votes or registers to vote on question as to his domicil or residence for other purposes. 107 A.L.R. 448.

Exemptions — *farming as trade or profession.* In Young v. Geter, 185 La. —, 107 A.L.R. 608, 170 So. 240, it was held that the occupation of farming is a "trade or profession" within the provisions of a statute exempting the "tools and instruments necessary for the exercise of the trade or profession by which" the lessee "gains his living and that of his family," from a lessor's right to subject to the payment of rent movable effects of the lessee found on the property leased, including, in the case of predial estates, "everything that serves for the labors of the farm."

Annotation: Farmer as within the description of persons entitled to the protection of debtors' exemption statutes. 107 A.L.R. 614.

Evidence — *burden of proof as to good faith.* In Hood v. Webster, 271 N. Y. 57, 107 A.L.R. 497, 2 N. E. (2d) 43, it was held that one claiming under a statute declaring an unrecorded conveyance of realty to be void against the subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first duly recorded, has the burden of proving, by a fair preponderance of evidence, that he was a purchaser in good faith and for a valuable consideration.

Annotation: Presumption and burden of proof as regards good faith and consideration on part of purchaser or one taking encumbrancer subsequent to unrecorded conveyance or encumbrance. 107 A.L.R. 502.

Evidence — *confidential communications to physician.* In Bassil v. Ford Motor Co. 278 Mich. 173, 107 A.L.R. 1491, 270 N. W. 258, it was held that physician-patient privilege may not be avoided upon the ground that the purpose of the consultation was examination and not treatment, where a man and his wife went to a physician to ascertain why a child was not born of their union, their obvious desire for offspring giving rise to an inference that curative and remedial measures, if available, were contemplated, although in fact he was found hopelessly impotent.

Annotation: Physician-patient privilege as affected by contention that purpose was examination and not treatment. 107 A.L.R. 1495.

Guaranty — *preferred stock of corporation.* In Hamilton v. Meiks, — Ind. —, 107 A.L.R. 1165, 4 N. E. (2d) 536, it was held that guaranty by individuals of payment indorsed on the back of a certificate of preferred stock which provided that the stock was to be due and payable at the end of ten years and provided for the payment of cumulative dividends, imports an agreement that if the corporation does not pay or cannot pay, the guarantors will pay, and not merely an agreement by the guarantors that the corporation will pay if and when corporate funds are available for that purpose.

Annotation: Validity, construction, and application of guaranty of corporate stock, or dividends thereon, by one other than corporation. 107 A.L.R. 1171.

Health Insurance — *confinement to bed.* In Lewis v. Liberty Industrial Life Ins. Co. — La. —, 107 A.L.R. 286, 170 So. 4, it was held that a provision in a policy of insurance against disability from sickness or accident that "weekly benefits for sickness will only be paid for each period of seven consecutive days that the insured is, by reason of illness, necessarily confined to bed and that he shall remain under the professional care of a duly licensed and practising physician," is for the purpose of making certain the disability and protecting the insurer against imposition, and hence does not operate to make confinement to bed a condition of the right to benefits wherein the insured is in fact disabled without being confined to bed.

Annotation: Construction and application of provision of accident or health insurance as regards confinement to bed. 107 A.L.R. 289.

Highways — *injury from landslides.* In Boskovich v. King County, — Wash. —, 107 A.L.R. 591, 61 P. (2d) 1299, it was held that a county cannot be held liable to the user of a highway for injuries by a landslide from an adjacent hillside, where it does not appear that the construction of the road had anything to do with causing the slide, no reasonable or practicable construction of a bulkhead or retaining wall would have prevented it, and the county had no notice that there was danger of a slide at that particular point; nor is it liable for failure to remove from the hillside logs, stumps, and other material resting thereon which were not of such a nature or in such a position as to constitute, within the bounds of reasonable probability, any menace to persons traveling along the road.

Annotation: Liability of public for injury or damage from slides or fall of object from embankment at side of highway. 107 A.L.R. 596.

Income Taxes — *deductions for trustee.* In Stuart v. Commissioner of Internal Revenue, 107 A.L.R. 438, 84 F. (2d) 368, it was held that a loss sustained from reimbursing a trust of which the taxable is a trustee for funds lost through an improper investment is not deductible in computing his taxable income as a loss incurred in a "transaction entered into for profit though not connected with a trade or business" (Revenue Act of 1928, § 23 (e) (2), 26 U. S. C. A. (1934 ed.) § 23 (3) (2)), since any profits made from the investment would have belonged to the trust; and it is immaterial that as a beneficiary of the trust he receives a share of the income.

Annotation: Deductibility, in determining individual income tax of trustee or other fiduciary, of amount paid by him, or for which he is responsible, on account of an improper investment. 107 A.L.R. 443.

Infants — *right to custody.* In Sheehy v. Sheehy, — N. H. —, 107 A.L.R. 635, 186 A. 1, it was held that the wrong of a mother in bringing her child into the state in disobedience to an order of a court of another state of competent jurisdiction does not render inapplicable a statute which provides that if the wife of a citizen of another state has resided in the state six months successively, separate from her husband, she shall have the exclusive custody of the child, in view of other provisions of the statute which contemplate that the wife may retain the exclusive custody notwithstanding that the husband has obtained a divorce in another state or country.

Annotation: Jurisdiction over custody of child, or determination on merits of the right to such custody, as

affected by the fact that child was brought into the state in violation of decree or order of the court of another state or country. 107 A.L.R. 642.

Injunctions — *joinder in conspiracy suits.* In State v. Hasson Grocery Co. — Miss. —, 107 A.L.R. 663, 170 So. 234, it was held that an agreement by vehicle operators not to pay the mileage tax required by a Motor Vehicle Act, the constitutionality of which was subsequently upheld, is an unlawful agreement and a conspiracy which supports their joinder in a suit by the state against them under a bill which prays that they be required to make the reports contemplated by the statute, seeks a temporary injunction and a decree for the full amount of the tax found to be due with penalties and expenses incurred, and an injunction against their use of the highways for the period prescribed by statute in the event of failure to comply with its terms.

Annotation: Concerted action or agreement to resist enforcement of a statute because of doubt as to its constitutionality or construction as ground for joinder of defendants in action or suit by governmental authorities. 107 A.L.R. 670.

Insurance — *ownership of foreclosed property.* In Koch v. Transcontinental Ins. Co. — Wis. —, 107 A.L.R. 1196, 269 N. W. 539, it was held that title of the mortgagor after foreclosure and during foreclosure period of redemption is unconditional and sole ownership within provision of policy of insurance in that regard.

Annotation: Insurance: mortgagor or privy as sole and unconditional owner after judgment of foreclosure and during redemption period. 107 A.L.R. 1201.

Articles in May and June, 1937, issues of

AMERICAN BAR ASSOCIATION JOURNAL

(1140 N. Dearborn St., Chicago, Ill.)

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The Supreme Court and the Rights and Interests of Labor (*by John H. Crooker*).

Letter on Supreme Court Issue to Volunteer Citizens Committee of Boston (*by Arthur L. Corbin*).

The Supreme Court and the President's Proposal (*by Hon. Theodore Francis Green*).

American Law Institute Holds Fifteenth Annual Meeting.

Reception by the Courts of the Restatement of Trusts (*by Austin W. Scott*).

Review of Recent Supreme Court Decisions (*by Edgar Bronson Tolman*).

The Forensic Value of Blood Tests in Evidence: A Review (*by William Louis Flacks*).

Split Decisions in the Supreme Court in Invalidating Federal and State Enactments and Attempted Exercises of Power 1933–1937 (*by Clarence J. Shearn, Jr.*)

Defense of our Constitutional System (*by Walter F. Dodd*).

Bill for "Reforming" the Supreme Court (*by Frank H. Sommer*).

A GRATEFUL ACKNOWLEDGMENT TO AN HONORABLE PROFESSION

ON April 18, 1906, the date of the great fire, the legal fraternity of this country was indebted to us in a sum in excess of $200,000. The fire destroyed all of our books of accounts. ■ The lawyers of San Francisco having lost their entire libraries were absolved of their indebtedness to us, amounting to about $30,000. This left an amount due from outside lawyers of from $170,000 to $175,000. Having no lists of patrons, we sent a circular letter to the lawyers named in Martindale's Legal Directory, advising them of our loss and asking for information as to their indebtedness to us.

■ The responses to this circular were so prompt and so gratifying that we think the legal profession should know that of this total indebtedness of say $175,000, nearly $150,000 has already been reported to us, and we are receiving advices every day from parties who had not previously answered our circular asking about their indebtedness.

■ It is but right to say that some of the San Francisco attorneys declined to accept the cancellation of their accounts and have paid same. Let it be known to the world that the legal profession is made up of men of the highest honor.

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Insurance — *rejection of applicants.* In Employers' Liability Assur. Co. v. Frost, — Ariz. —, 107 A.L.R. 1413, 62 P. (2d) 320, it was held that a mandatory statutory provision requiring insurance companies entering the field of workmen's compensation insurance to accept all applications for such insurance, and in effect to waive the right as to selection of risks, as applied to a foreign insurance company which has obtained from the corporation commission a license or certificate as a condition of writing workmen's compensation insurance, violates freedom of contract guaranteed by the Fourteenth Amendment.

Annotation: Right of insurance company, in view of its public interest, to reject applications for insurance. 107 A.L.R. 1421.

Master and Servant — *compensation for overtime.* In Thibault v. National Tea Co. — Minn. —, 107 A.L.R. 702, 269 N. W. 466, it was held that where an adult man agrees to serve as manager of a store at a stipulated weekly salary which is paid at the end of each week, he cannot, after the employment terminates, recover by virtue of § 4087, Mason's Minn. Stat. 1927, extra pay for the time he worked in excess of ten hours a day.

Annotation: Servant's right to compensation for extra work or overtime. 107 A.L.R. 705.

Mines — *relation created by lease.* In Adams v. Riddle, — Ala. —, 107 A.L.R. 657, 170 So. 343, it was held that the conventional relation of landlord and tenant essential to the maintenance of the summary action of unlawful detainer under the statute is not created by a mineral "lease" by which the owner grants and demises all the minerals in and under a tract of land, and also the tract of land for the purpose and with the exclusive right of mining and operating thereon, to have and to hold for a specified term of years and as much longer as minerals are found in paying quantities thereon.

Annotation: Forcible entry and detainer or unlawful detainer as applicable in case of "lease" of minerals or oil and gas. 107 A.L.R. 661.

Municipal Corporation — *liability to holder of public improvement warrant.* In Blackford v. Libby, — Mont. —, 107 A.L.R. 1348, 62 P. (2d) 216, it was held that a city the general credit of which is not pledged for a local improvement is liable to the holder of a local improvement warrant which would have been paid out of the fund collected from the improvement district but for its depletion as the result of the mistake of the city treasurer in paying for the second time a warrant of prior registration; and liability cannot be avoided upon the theory that the city treasurer in making such payment was acting as the agent of the warrant holders.

Annotation: Liability of municipality because of misappropriation, diversion, or withholding of funds collected by or paid to it on account of special assessment against property for improvements. 107 A.L.R. 1354.

Newspapers — *municipal regulation of street sale.* In People v. Kuc, 272 N. Y. 72, 107 A.L.R. 1272, 4 N. E. (2d) 939, it was held that a village ordinance which absolutely prohibits the sale of newspapers on any public street or other public place, or by going from house to house, or from place of business to place of business, between the hours of 9 o'clock in the evening and 7 o'clock in the forenoon, is invalid as unreasonable and discriminatory in favor of local news dealers who have regular stands or

other places of business, and is not justified by the ostensible purpose to eliminate disturbing noises during the hours in question.

Annotation: Constitutionality, validity, construction, and application of statutes or ordinances relating to sale of newspapers on the street. 107 A.L.R. 1275.

Pleading — *undue influence.* In Peavey v. Crawford, 182 Ga. 782, 107 A.L.R. 828, 187 S. E. 13, it was held that if undue influence is relied on to impeach a paper propounded as a will, the facts constituting such undue influence must be alleged. A general averment that certain legatees influenced the testatrix to make a will presents no issue of undue influence. Where the subscribing witnesses testified that the will was executed in proper form, and that the testatrix was of sound and disposing mind and memory, and their testimony upon this point was not controverted, a verdict probating the will was demanded.

Annotation: Form and particularity of allegations to raise issue of undue influence. 107 A.L.R. 832.

Receivers — *ex parte appointment.* In Parrish v. Rigell, — Ga. —, 107 A.L.R. 1385, 188 S. E. 15, it was held that under the allegations of the petition the court did not err in appointing ex parte a temporary receiver.

(a) A person who is insane cannot in person maintain a suit.

(b) A lunatic or person non compos mentis having no legal guardian may sue by any competent person as his next friend. And, where the question of sanity or insanity is involved in the subject matter of the suit, the question may be tried irrespectively of whether a commission of lunacy has been issued or not.

(c) Where such a suit is brought,

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the respresentative of the alleged incompetent is an officer of the court.

Annotation: Remedy for conservation of property of alleged incompetent prior to his adjudication as such. 107 A.L.R. 1392.

Removal of Causes — *amending amount claimed.* In Egan v. Preferred Accident Ins. Co. — Wis. —, 107 A.L.R. 1107, 269 N. W. 667, it was held that the condition as regards minimum jurisdictional amount, of the right to remove a case from the state to the Federal court, is not satisfied where the amount due on the contract, which was liquidated and ascertainable, was less than the jurisdictional amount at the commencement of the action, notwithstanding that by amendment of the complaint in the state court the plaintiff sought to recover additional instalments that accrued under the contract after the commencement of the action, which in addition to the original amount equaled or exceeded the jurisdictional minimum.

Annotation: Necessity that condition, as regards jurisdictional amount, of right of removal of case from state to Federal court, shall have existed at time of commencement of action. 107 A.L.R. 1115.

Sales Tax — *computation of.* In Jensen Candy Co. v. State Tax Com. — Utah, —, 107 A.L.R. 261, 61 P. (2d) 629, it was held that a retail sales tax of 2 per cent of the purchase price, for which the vendor is accountable and which he is authorized to collect from the purchaser if he sees fit, is not rendered inapplicable in case of sales which involve a tax collection of a fractional part of a cent by a provision therein that the vendor "in no case shall . . . collect as tax an amount (without regard to fractional parts of one cent) in excess of the tax computed at the rates prescribed by this act."

Annotation: Computation of sales tax. 107 A.L.R. 267.

Succession Taxes — *conditional gifts.* In United States v. Fourth National Bank, 107 A.L.R. 793, 83 F. (2d) 85, it was held that whether the deduction from the decedent's gross estate for which the Federal Estate Tax Law provides, of the amount of legacies or transfers for public, religious, charitable, scientific, literary, or educational purposes, may be made where a condition is attached to the gift, depends upon whether the value of the donee's contingent interest can be ascertained by reasonable methods or by recognized data as of the date of the death of the decedent.

Annotation: Conditional nature of gift or bequest for public, charitable, or religious uses as preventing deduction in computing estate tax. 107 A.L.R. 801.

Succession Taxes — *unpaid balance of gift as deductible.* In Turner v. Commissioner of Internal Revenue, 107 A.L.R. 1468, 85 F. (2d) 919, it was held that balance remaining unpaid at decedent's death on his written pledge to the International Committee of the Young Men's Christian Association, constituting a legal obligation of the estate and paid by the executors, is deductible in computing Federal estate tax under the Revenue Act of 1926, either under the view that it is within the deduction provision of that act in respect of "claims . . . incurred or contracted bona fide for adequate and full consideration in money or money's worth," or within the deduction provision of the act in respect of "transfers, to or for the use of . . . any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes."

Annotation: Deductibility in com-

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puting estate or succession tax of amount remaining unpaid at decedent's death upon his pledge to religious, charitable, or educational organization, 107 A.L.R. 1471.

Summary Judgment — *what is "debt or liquidated demand."* In Norwood Morris Plan Co. v. McCarthy, — Mass. —, 107 A.L.R. 1215, 4 N. E. (2d) 450, it was held that the words "a debt or liquidated demand" in the provisions of a statute descriptive of the character of claims on contracts in respect of which immediate entry of judgment may be permitted ought not to be given a constricted interpretation; but ought not to be stretched to include causes or actions outside the main purpose of the enactment.

Annotation: What amounts to "debt," "liquidated demand," "contract," etc., within contemplation of summary or expedited judgment statutes. 107 A.L.R. 1221.

Subrogation — *to mortgagor's personal liability.* In Martin v. Hickenlooper, — Utah, —, 107 A.L.R. 762, 59 P. (2d) 1139, 61 P. (2d) 307, it was held that one subrogated to the lien of a mortgage for the discharge of which he has advanced money to a remote grantee of the mortgagor does not thereby become entitled to enforce the personal liability of the mortgagor for the mortgage debt.

Annotation: Scope and extent of subrogation in favor of one entitled to be subrogated to mortgage lien. 107 A.L.R. 785.

Taxation — *action for recovery of occupation tax.* In Independence v. Hindenach, — Kan. —, 107 A.L.R. 645, 61 P. (2d) 124, it was held that where the statute which authorizes a city of the second class to impose an occupation tax further provides that the city "shall fix the amount of all

license fees and provide for their collection," a civil action for the collection of such fees may be maintained by the city.

Annotation: Liability for license fee or occupation tax of one who has conducted business without required license or payment. 107 A.L.R. 652.

Taxes — *bank deposits.* In Commonwealth v. Madden, 265 Ky. 634, 107 A.L.R. 1379, 97 S. W. (2d) 561, it was held that property taxation of deposits of residents in banks in other states, at the rate applicable to intangible property generally, whereas a lower rate is fixed for deposits in state banks or in national banks doing business in the state, is not a denial of equal protection of the laws, since the classification involved is not unreasonable.

Annotation: Constitutionality of discrimination between deposits in local banks and those in foreign banks as respects their subjection to, or the rate of, tax. 107 A.L.R. 1385.

Taxation — *corporate surplus transferred to stock account.* In People v. Graves, 272 N. Y. 77, 107 A.L.R. 1333, 4 N. E. (2d) 941, it was held that the transfer of a portion of a corporation's earned surplus to its no par value capital stock account is not in effect the declaration or payment of a "dividend" within the Franchise Tax Law which requires a corporation to pay 3 per centum upon the amount of dividends declared or paid in excess of 4 per centum upon the actual amount of paid-up capital employed in the state, notwithstanding that such transfer increases the amount upon which the corporation is entitled to pay a 4 per cent dividend without incurring a tax under the statute.

Annotation: Transfer of surplus to capital stock account as a dividend for purposes of franchise tax. 107 A.L.R. 1335.

Vendor and Purchaser — *waiver of right to declare forfeiture.* In Johnson v. Feskens, 146 Or. 657, 107 A.L.R. 340, 31 P. (2d) 667, it was held that by accepting instalments of the purchase price, or interest, a vendor in a land contract waives the right to rescind or declare a forfeiture for prior default in payment by the vendee, under a contract declaring that time is of the essence thereof and that the vendor has an option to declare the amount paid forfeited and the contract canceled unless payments are made strictly at the time provided, but does not thereby waive the right to declare a forfeiture for nonpayment of instalments subsequently falling due.

Annotation: Waiver of, or estoppel to assert, or election not to assert, forfeiture of executory land contract because of default in payment. 107 A.L.R. 345.

Waters — *private parties draining into public sewer.* In Hampton v. Spindale, 210 N. C. 546, 107 A.L.R. 1188, 187 S. E. 775, it was held that private concerns which drain their sewage and industrial waste into the sewer system owned and operated by the town exclusively are not liable to a riparian owner for damage from the discharge of the sewage into a stream.

Annotation: Liability of private persons or corporations draining into sewer maintained by municipality or other public body for damages to riparian owners or others. 107 A.L.R. 1192.

Waters — *sale of sand from beach.* In State v. Knowles-Lombard Co. — Conn. —, 107 A.L.R. 1344, 188 A. 275, it was held that a riparian owner has no right to remove and sell sand from a public beach between high and low watermarks on navigable water where the tide ebbs and flows,

as such conduct exceeds the fundamental right of access on which his other rights depend.

Annotation: Right of owner of upland to make a use, not connected with navigation, of the shore between high and low watermarks which excludes the general public. 107 A.L.R. 1347.

Witnesses — *waiver of incompetency of transactions with decedents.* In Lampe v. Franklin American Trust Co. — Mo. —, 107 A.L.R. 465, 96 S. W. (2d) 710, it was held that an executor who introduces into evidence in a proceeding to establish a note as a claim against his decedent's estate a transcript of testimony as to the consideration therefor, given by the claimant on cross-examination while testifying as a witness in support of another's claim against the estate, waives the incompetency of the claimant to testify with respect to transactions with the decedent in connection with the execution of the note.

Annotation: Examination of witness as waiver of his incompetency as to transactions or conversations of decedent. 107 A.L.R. 482.

Workmen's Compensation — *intent to evade act.* In York v. Industrial Commission, — Wis. —, 107 A.L.R. 841, 269 N. W. 726, it was held that contracts otherwise valid were entered into for the purpose of creating the relation of independent contractor and contractee rather than master and servant, in order to evade liability for compensation under the Workmen's Compensation Act, does not deprive them of such effect.

Annotation: Status of independent contractor as distinguished from employee for purposes of workmen's compensation act as affected by intention to evade or avoid the requirements of that act. 107 A.L.R. 855.

Workmen's Compensation — *notice of claim.* In Consumers Co. v. Industrial Commission, 364 Ill. 145, 107 A.L.R. 811, 4 N. E. (2d) 34, it was held that the requirement of a Workmen's Compensation Act that notice of accident be given as soon as practicable, but not later than thirty days after the accident, is met where the widow of an employee who had disappeared and whose body was found over three months later in a river which adjoined the employer's premises, suggested in a conversation with an officer of the employer corporation within such period that her husband might have fallen into the river, and the statute provides that no defect or inaccuracy of such notice shall be a bar to the maintenance of a compensation proceeding unless the employer proves that he is unduly prejudiced, and, in providing that notice of the accident shall give the approximate date and place of the accident, adds the qualifying words "if known."

Annotation: Requirement of workmen's compensation act as to notice of accident or injury. 107 A.L.R. 815.

Writ and Process — *conclusiveness of return of service.* In Vaughn v. Love, — Pa. —, 107 A.L.R. 1336, 188 A. 299, it was held that the Pennsylvania rule as to conclusiveness of the sheriff's return of process does not apply to a return showing personal or constructive service in the state upon one who claims to be a nonresident and not present in the state when the service was made, a state of facts that may be established by evidence dehors the record.

Annotation: Return of service of process in action in personam showing personal or constructive service in state as subject to attack by showing that defendant was a nonresident and was not served in state. 107 A.L.R. 1342.

Remington on...

BANKRUPTCY

★ THE 1937 Supplemental Pocket Parts, together with new Replacement Volume 5, issued in January of this year, brings the set right to date and makes it a 1937 edition.

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CURRENT U. S. DECISIONS

THE future historian will find much to comment upon in the decisions of the past term of the Supreme Court of the United States. The lawyer, on the other hand, in addition to the constitutional questions involved, will find hidden away many cases of practical value that are likely to have been overshadowed by the sensational nature of some of the current questions involved.

Constitutional Landmarks

For the purpose of refreshing the memory, a brief reference will be made to the outstanding constitutional problems determined by the Supreme Court.

LIMITATION ON DEFICIENCY JUDGMENTS SUSTAINED

In Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co., 81 L. ed. Adv. Ops. 361.

It was held that chapter 275, section 3, of the North Carolina Laws of 1933, which permits a claim for a deficiency judgment to be offset by the difference between the price at which the mortgagee purchased the mortgaged property at the trustee's sale and the true value of such property was valid.

GOLD CLAUSE CASE

In Holyoke Water Power Co. v. American Wrapping Paper Co. 81 L. ed. Adv. Ops. 383.

The Supreme Court upheld the validity, as applied to a provision of a lease measuring rental by gold bullion equivalent to a certain number of dollars in gold coin of a specified standard of weight and fineness, of the Joint Resolution of June 5, 1933, declaring every provision which purports to give the obligee a right to require payment in gold or in an amount of money of the United States measured thereby to be against public policy and to be dischargeable by payment, dollar for dollar, in any coin or currency which, at the time of payment, is legal tender.

SECOND FRAZIER-LEMKE ACT CASE

In Wright v. Mountain Trust Bank, 81 L. ed. Adv. Ops. 487.

The Amended Frazier-Lemke Act was upheld by a unanimous court.

LABOR LEGISLATION

Constitutionality of Railway Labor Act in Virginian Railway Co. v. System Federation No. 40, 81 L. ed. Adv. Ops. 470.

The Court unanimously upheld the new Labor Legislation Minimum Wage Law.

West Coast Hotel Co. v. Parrish, 81 L. ed. Adv. Ops. 455.

The court upheld the Washington Minimum Wage Law case, authorizing the fixing, by state authority, of reasonable minimum wages for wom-

en and minors which shall be adequate for the decent maintenance of women workers, upon the recommendation of a conference composed of representatives of employers and employees and of the public, and permitting the employment, at less than the prescribed minimum wage, under special license, of women who are physically defective or crippled by age or otherwise.

LABOR LEGISLATION

Unemployment Insurance Law

In Chamberlin v. Andrews, 81 L. ed. Adv. Ops. 69.

The court upheld, without opinion by an equally divided court, the New York Unemployment Insurance Law.

LABOR LEGISLATION

In a series of five decisions on April 12th, the Supreme Court upheld the validity of the National Labor Relations Act,—as applied to Manufacturing: National Labor Relations Board v. Jones & Laughlin Steel Corp. 81 L. ed. Adv. Ops. 563; National Labor Relations Board v. Fruehauf Trailer Co., 81 L. ed. Adv. Ops. 563; National Labor Relations Board v. Friedman Marks Clothing Company, 81 L. ed. Adv. Ops. 563.

As applied to Associated Press: Associated Press v. National Labor Relations Board, 81 L. ed. Adv. Ops. 603.

As applied to interstate carrier: Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 81 L. ed. Adv. Ops. 601.

LABOR LEGISLATION

Social Security Act Cases

On May 24th, the Supreme Court handed down Chas. C. Steward v. Davis, 81 L. ed. Adv. Ops. 779 and Helvering v. Davis, 81 L. ed. Adv. Ops. 804, upholding the Social Security Act.

LABOR LEGISLATION

Unemployment Insurance

In Carmichael v. Southern Coal & Coke Co. 81 L. ed. Adv. Ops. 811, the Alabama Unemployment Compensation Act which insists upon employers' obligation to pay a certain percentage of their monthly payrolls in to the State Unemployment Compensation Fund, was held to be a valid exercising of the taxing power of the state.

ANNOTATIONS

A few of the L. ed. Annotations which will appear in volume 81 L. ed. are noted for the convenience of the reader.

Propriety of staying proceedings in action or proceedings pending another case or proceeding. Landis v. North American Co. 81 L. ed. (U. S. Adv. Ops.) 124.

Jurisdictional amount in Federal case other than for recovery of money judgment. KVOS v. Associated Press, 81 L. ed. (U. S. Adv. Ops.) 143.

Provability of landlord's claims under § 63 (as amended in 1934) and § 77B of Bankruptcy Act. City Bank Farmers Trust Co. v. Irving Trust Co. 81 L. ed. (U. S. Adv. Ops.) 241.

Judgment in tax cases as res judicata. Supplementing note in 71 L. ed. 1013. Blair v. Commissioner of Internal Revenue, 81 L. ed. (U. S. Adv. Ops.) 265.

Necessary connection or participation by accused with acts or transaction upon which a charge of the offense of making, or causing to be made, a false entry in books or records, is predicated. United States v. Giles, 81 L. ed. (U. S. Adv. Ops.) 364.

Constitutionality, construction, and application of statutes relating to agricultural fertilizers. National Fertilizer Asso. v. Bradley, 81 L. ed. (U. S. Adv. Ops.) 610.

Scope and extent of judicial notice of economic depression and conditions incident thereto. Ohio Bell Teleph. Co. v. Public Utilities Commission, 81 L. ed. (U. S. Adv. Ops.) 680.

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THE HUMOROUS SIDE

The Weaker Sex. The following was actually served on the plaintiff's attorney in a divorce case.

"This is the answer of Herman Engelsman for the divorce case.
To the County Attorney,
Gallatin County,
State of Montana.

There are now living three minor children and the mother is to be confined the first part of June, 1927.

That I, H. E., in the month of January, 1923, was hit by her first on the side of my head for trying to quiet the child from crying. In the month of November, 1925, a rubber shoe was used striking once on her jaw. And in the month of June, 1926, I hit her twice with the handle of a garden hoe on her legs. And in the month of August I took one small glass, and one small bucket containing about six quarts of cold water and threw it on her head, for accusing me that I was abusing the little boy, and then she threw a sad iron clear across the room and hit me in the small of my back, and on February, 1st, 1927, I slapped Jane, age three, with my flat hand for standing up on the table and missing the burning gas lamp by an inch, and the mother interfered by throwing a granite pan at me, and then run and took a sad iron and hit me on the side of my head and then I hit her with my fist.

Now my wife owns one cow, 40 chickens and practically all the furniture.

I cannot make any promise for alimony nor for any attorney fees nor any Court costs."

Contributor: Seth F. Bohart,
Bozeman, Mont.

Double Jeopardy. A long-winded lawyer lately defended a criminal unsuccessfully, and during the trial the judge received the following note: "The prisoner humbly prays that the time occupied by the plea of the counsel for the defence be counted in his sentence."

High Cost of Loving. Movie Actress: "Really, Mr. Bigfee, I think that five thousand dollars for so simple a matter as a divorce is quite exorbitant!"

Mr. Bigfee (firmly, but respectfully): "Those are my usual terms, Madam."

Movie Actress (with hauteur): "Very well, sir, you may write a receipt; but I have never paid so much before, and I never will again."

The Aftermath. Spectator (to defendant): Well, I guess the jury will find for you. The judge's charge was certainly very much in your favor. Don't you think so?

Defendant (moodily): Oh, I knew all along that the judge's charge would be all right. It's the lawyer's charge that's worrying me.—*Detroit Free Press.*

A Beer Acquaintance. "Witness, did you ever see the prisoner at the bar?"

"Oh, yes, very frequently. That is where I got acquainted with him."

Juror with One Ear Good Enough for Court. Court attachés say it really happened in circuit court.

A man walked to the bench and said:

"Your Honor, I'd like to be excused from jury duty next week."

"For what reason?" asked the judge.

"Well, you see, I'm partly deaf, can hear only with one ear."

"Oh, that's all right," the judge replied. "You know we hear only one side of a case at a time."

Contributor: Lheib M. Nivlem,
Milwaukee, Wisc.

Was His Face Red. A young lawyer who prided himself on his appearance had

a special brief case made of green Morocco leather. A few weeks later, he inadvertently left it in an office of a firm lawyer in a near-by city. On his return he wired, "Have you a green lawyer's brief case in your office?" He received the following reply from the senior member. "We have several, can you identify?"

Husbands Beware. "By law, a man is not justified in deserting his wife because she is extravagant or lazy, or swears, or uses coarse language, or is sickly, fretful, or of violent temper, or because she wreaks her temper or showers her coarse or profane language upon him and thus makes his life uncomfortable. These are not crimes but infirmities and defects which in consideration of law, a husband undertakes to put up with when he takes his wife for better or worse." Boyce vs. Boyce, 23 N. J. Equity Reports, 337.

Contributor: Benjamin I. Cantor,
Keyport, N. J.

Objects to Question Not to Answer. During a recent suit in behalf of the State of Texas against B. B. Jones wherein the State was seeking to obtain a temporary injunction against Jones on the grounds that his Beer Parlor was being operated in such a manner as to constitute a common nuisance, a witness for the State had testified to various and sundry acts allowed to be committed upon the premises by the defendant Jones. Among those testified to by the witness was that he had seen old men and young women together in defendant's place of business. On cross-examination, defendant's counsel asked the witness, "What did you see the old men and young girls doing?" To which the witness replied, "The old men were having a high-heeled time." Thereupon defendant's counsel requested the Court to exclude this answer of the witness, same being a conclusion. Whereupon the Court remarked, "Surely your objection does not go to the old men having a high-heeled time, does it?"

Contributor: Alex P. Pope,
Tyler, Tex.

The Juror's Charge. The other day a juror noticed a brother-juryman sitting next him having a quiet doze. He nudged the sleepy man, and whispered: "Do you understand the judge's charge?"

"What?" exclaimed the drowsy juror, waking up with a start,—"what? He don't charge us anything for that, does he? I thought that we were going to get pay—."

Before the Lindbergh Law. A judge delivering a charge to a jury, said: "Gentlemen, you have heard the evidence. The indictment charges the prisoner with stealing a pig. This offence seems to be becoming a common one. The time has come when it must be put a stop to; otherwise, gentlemen, none of you will be safe."

A Proper Place. A witness was being examined at a trial of an action for the price of goods which were alleged by the defendant to have been returned as not up to sample.

"Did you see the defendant return the oats?"

"Yes, your Honor."

"On what ground did he refuse to accept them?"

"In the back yard, your Honor."

Outside Help Necessary. A lawyer was once arguing a motion before a Judge at a time when his Honor was busy. After listening patiently for some time, the Court said that he would not trouble him to discuss that point further. Disregarding the hint, the lawyer was proceeding with his argument, when he was again interrupted by the Court with the remark that if he had any authorities in support of his position he might cite them; otherwise, as the time of the Court was fully occupied, he must decline to listen to further argument on the matter.

Said the attorney: "If there are no authorities in support of my position, perhaps it would be worth while, your Honor, to have a little patience and hear a first-class original reason in its favor."

"Very well," replied the Judge, "Bring on your man!"

Suggestive Questions. An Irishman not long since was summoned before a bench of county magistrates for being drunk and disorderly.

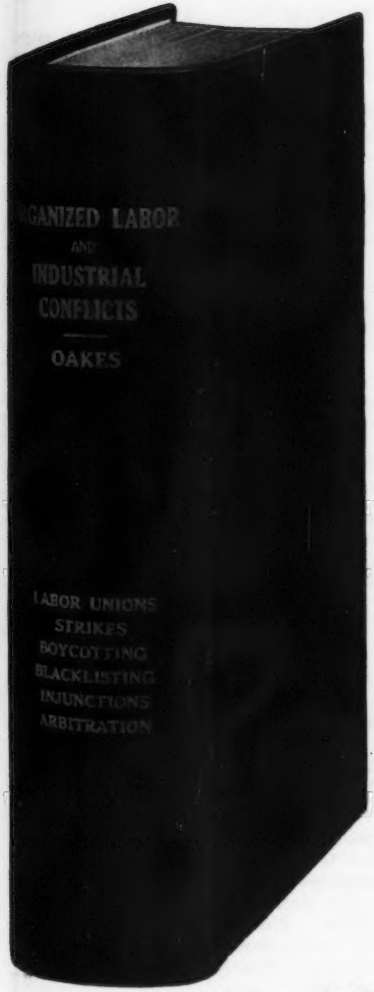
"Do you know what brought you here?" was the question put to him.

"Faix, yer Honor, two policemen," replied the prisoner.

"Had not drink something to do with

ORGANIZED LABOR *and* INDUSTRIAL CONFLICTS

By EDWIN S. OAKES



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bringing you here?" said the magistrate, frowning.

"Sortinly," answered Pat, unabashed; "they were both drunk."

Queer Excuses. Legal annals could furnish many instances of quite as queer excuses pleaded by the accused as the following. The widow of a French chemist, famous for his researches in toxicology, was on trial for poisoning her husband. It was proved that arsenic was the medium employed.

"Why did you use that poison?" asked the presiding magistrate.

"Because," sobbed the fair culprit, "It was the one he liked best."

Hard to Reconcile. At a trial in France the foreman of the jury, placing his hand on his heart, with a voice choked with emotion, gave in the following verdict: "The accused is guilty, but we have our doubts as to his identity."

Typical College Question. A law professor was asked whether a blind man could be made liable for his note payable at sight.

An Honest Purpose. "So you were not satisfied to eat a dinner at the man's restaurant without paying for it, but you went off with the caster and the spoons besides?"

"That's so, your Honor; but I took the caster and the spoons from honest motives."

"Honest motives?"

"Yes, I wanted to pawn them, so I could raise money to pay for the dinner."

A Topsy Turvy Examination. The following droll incident is related as having taken place in one of the municipal courts of Boston, on the trial of a prisoner charged with theft, who pleaded drunkenness in extenuation.

Court (to the policeman who was a witness): What did the man say when you arrested him?

Witness: He said he was drunk.

Court: I want his precise words, just as he uttered them. He didn't use the pronoun he, did he? He didn't say "He was drunk?"

Witness: Oh yes, he did. He said he was drunk; he acknowledged the corn.

Court (getting impatient at the witness's stupidity): You don't understand me at all; I want the words as he uttered them. Didn't he say, "I was drunk?"

Witness (deprecatingly): Oh, no, your Honor. He didn't say you were drunk; I wouldn't allow any man to charge that upon you in my presence.

Prosecutor: Pshaw! You don't comprehend at all. His Honor means, Did not the prisoner say to you, "I was drunk?"

Witness (reflectively): Well, he might have said you was drunk, but I didn't hear him.

Attorney for Prisoner: What the court desires is to have you state the prisoner's own words, preserving the precise form of pronoun that he made use of in reply. Was it the first person, I, second person, thou, or the third person, he, she, or it? Now, then (with severity), upon your oath didn't my client say, "I was drunk?"

Witness (getting mad): No, he didn't say you was drunk, either; but if he had, I reckon he wouldn't 'a' lied any. Do you s'pose the poor fellow charged the whole court with being drunk?

If Wishes Were True. Instructor (at a law school): What is an accommodation note?

Student: One which the maker doesn't have to pay until he is ready to.

No Choice. A young thief who was charged the other day with picking pockets, demurred to the indictment, "for that, whereas he had never picked pockets, but had always taken them just as they came."

Would Fill the Bill. A lawyer who was defending a suit for a widow, in the fervor of his zeal in his client's cause, exclaimed: "Gentlemen of the jury, a man who would be so mean as to sue a helpless widow-woman ought to be kicked to death by a jackass; and, gentlemen, (here the eloquent counsel turned towards the judge), I wish his Honor would here and now appoint me to do the kicking."

Sound Advice. Attorney: My dear madam, I find that your estate is heavily encumbered. You will have enough to live upon, but you must husband your resources.

Widow: Well, my daughter Mary is my only resource now.

Attorney: Exactly; husband her as soon as possible.

Two Extremes. A judge once intervened to prevent a waste of words. He was sitting in Chambers, and seeing, from the piles of

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papers in the lawyer's hands that the first case was likely to be hardly contested, he asked,

"What is the amount in question?"

"Two dollars," said the plaintiff's counsel.

"I'll pay it," said the judge, handing over the money; "call the next case."

He had not the patience of taciturn Sir William Grant, who, after listening for a couple of days to the arguments of counsel as to the construction of an act, quietly observed when they had done: "That act has been repealed."

Careful. A negro witness giving evidence in court was asked if he knew the reputation of a neighbor for honesty.

"I don' know nuffin ag'in him, Jedge," was the reply; "but if I war a chickum, I'd roost high when he wuz hangin' round."

Admirable Restraint. Lord Brougham once, in giving judgment in a case in the Privy Council, made use of the following language: "As to the witness Jones, I believe him to be a depraved scoundrel, and I am satisfied that he has perjured himself up to his ears. Had he said more, I would give him my opinion of him."

Turning the Tables. A lawyer once brought an action for assault and battery in which the counsel for the defence pleaded molliter manus imposuit. The proof showed an aggravated assault and battery. When it came his turn to address the jury, he said: "Gentlemen, you all know I am no Latin scholar, but I think I can translate the gentleman's plea; molliter, he mauled; manus, the man; imposuit, and imposed on him. Now, gentlemen, did you ever hear of such impudence?—to shamefully abuse my client, and then to come into court and brag of it!" The argument was irresistible.

The Harm in Hearsay. A witness was testifying that he met the defendant at breakfast, and the latter called the waiter and said—

"Stop!" exclaimed the counsel for the defence, "I object to what he said."

Then followed a legal argument of an hour and a half on the objection, which was overruled, and the court decided that the witness might state what was said.

"Well, go on and state what was said to the waiter," remarked the winning counsel, flushed with his legal victory.

"Well," replied the witness, "he said, 'Bring me a beefsteak and fried potatoes.'"

A Strange Meeting. "Now, sir, you say you know the plaintiff's reputation, and you know it to be bad?"

"I do."

"Now tell the jury, on your oath, what reasons you have for making such a statement."

"Well, I can say on oath, sir, that I have met this man in places where I would be ashamed to be seen."

Reasonable Answer. Not long since an attorney at a county court deemed it necessary to impugn the respectability of a Mr. Butterworth, but the witness he relied on proved a good deal too much for him. The legal gentleman commenced thus:

"Do you know Mr. Butterworth?"

"Yes, I do."

"Well, then, now tell us what is Butterworth?"

The witness looked him full in the face; then, assuming an innocent and unconcerned expression, he replied, much to the delight of a crowded court: "Thirty cents a pound, although I have paid as high as—"

"That will do, sir; you can stand down, we shall not want you again."

A Cross Cross-examination. In a trial the counsel for the prosecution, after severely cross-examining a witness, suddenly put on a look of severity, and said,—

"Mr. Witness, has not an effort been made to induce you to tell a different story?"

"A different story from what I have told."

"That is what I mean."

"Yes, sir, several persons have tried to get me to tell a different story from what I have told, but they couldn't."

"Now, sir, upon your oath, I wish to know who those people are."

"Well, I guess you've tried as hard as any of them."

Opinionated Evidence. "I wish to ask this court," said a lawyer who had been called to the witness-box to testify as an expert, "if I am compelled to come into this case, in which I have no personal interest, and give a legal opinion for nothing?"

"Yes, yes, certainly," replied the mild-mannered judge; "give it for what it is worth."

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